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| APPLICATION NO. | FILING DATE | FIRST NAMED INVENTOR | ATTORNEY DOCKET NO. | CONFIRMATION NO. |
|---|-------------|----------------------|------------------------------------|------------------------|
| 10/733,129 | 12/11/2003 | Peter A. Chapman | MAVERICK 3.0-004 CONT CON | 7852 |
| 530 7590 12/15/2009 LERNER, DAVID, LITTENBERG, KRUMHOLZ & MENTLIK 600 SOUTH AVENUE WEST WESTFIELD, NJ 07090 | | | EXAMINER VERBITSKY, GAIL KAPLAN | |
| | | | ART UNIT 2855 | PAPER NUMBER |
| | | | MAIL DATE 12/15/2009 | DELIVERY MODE PAPER |

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The time period for reply, if any, is set in the attached communication.

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3 RECORD OF ORAL HEARING
4 UNITED STATES PATENT AND TRADEMARK OFFICE
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6
7 BEFORE THE BOARD OF PATENT APPEALS
8 AND INTERFERENCES
9

10 Ex parte PETER A. CHAPMAN and CHEE-ANN CHANG
11

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13 Appeal 2009-006174
14 Application 10/733,129
15 Technology Center 2800
16

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18 Oral Hearing Held: November 19, 2009
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22 Before MAHSHID D. SAADAT, CARLA M. KRIVAK, and CARL W.
23 WHITEHEAD, JR., *Administrative Patent Judges*.
24

25 ON BEHALF OF THE APPELLANTS:
26

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33 The above-entitled matter came on for hearing on Thursday,
34 November 19, 2009, commencing at 10:15 a.m., at The U.S. Patent and
35 Trademark Office, 600 Dulany Street, Alexandria, Virginia, before Deborah
36 Courville, Notary Public.
37

PROCEEDINGS

JUDGE SAADAT: Whenever you're ready.

MR. COCKINGS: Thank you, Your Honor.

And, again, good morning, and thank you for hearing us this morning.

And let me introduce Mr. Chapman. And as you may have seen from the papers, Mr. Chapman put in a declaration relating to commercial success in copying of the invent, of this invention, and he has been working with Maverick since 1982 in various capacities, both as a salesperson and as a product development guru. And it's Mr. Chapman who had the initial spark that led to this invention.

And just, Maverick is a small company and it's been around for about 30 years and Maverick competes by, you know, creating innovative products, and I think that this invention is innovative and it's certainly important to Maverick's business, because as a small person, if you're not innovative, you know, you will ultimately, you know, get run over by the big guys. And this product is a major product for Maverick in the sense that it helps to open doors to other products.

But the real reason is -- why are we here today? The reason we're here today is not about whether Mr. Chapman's invention is worthy or deserving of patent protection. I think the Patent Office and Examiner Verbitsky has already indicated that it is deserving of protection in that three patents of different varying scope have been granted for this invention.

So what we're here to talk about today, really, with this fourth application in the chain is what is the scope of the claims and the protection that Mr. Chapman and Maverick Industries is entitled to?

1 You know, I think as demonstrated by the Briefs, we strongly believe
2 that the prior art lacks the claim combination with respect to two specific
3 features. One feature is that there's no microprocessor that performs
4 calibration for taste and choice preference and the other feature is the second
5 handheld unit that receives readings from a first handheld unit.

6 But, just to provide some context, I think it's important to sort of go
7 back to where would this have begun, because in 1999, Mr. Chapman filed a
8 provisional application. And when he filed that provisional application, as
9 reflected by the prior art, that's before the Board and before this, this
10 particular combination was not known. It was not out there. Mr. Chapman
11 created the combination, and the features that we regard as making this
12 combination particularly novel.

13 Now, why is it important? Because it's ten years later, and basically,
14 where we are with the Patent Office is, and Examiner Verbitsky, Examiner
15 Verbitsky says "In order for you to get a patent, you have to put in these
16 features. Most notably, you have to put in a curved probe." And each time
17 we have had this debate with her, she says you've got to put the curved probe
18 in, we put the curved probe in, and she says fine.

19 So we're here today to sort of say what is the real metes and bounds of
20 this invention? Because if the curved probe is disclosed by Chung, then it's
21 certainly not the curved probe that makes this patent patentable art, this
22 invention patentable. It has to be something else.

23 So the Examiner tries to make up for what we regard as the
24 deficiencies in the prior art by pointing to like inherent disclosure. And she
25 points to, you know, several pieces of prior art, but all those other references

1 miss the mark. And what these references prove is that Mr. Chapman's
2 system bears all the hallmarks of a classic invention.

3 But, even in spite of this, in allowing the prior patents, the Examiner
4 has sort of cornered us into saying, "You're going to have to write a picture
5 claim to, like, Figure 1 of the application. You're going to have to put in a
6 curved probe." So we -- yes, sir?

7 JUDGE WHITEHEAD: Sorry. I mean, so what you -- let's go back
8 to your first issue. You were talking about taste and choice?

9 MR. COCKINGS: Yes, sir.

10 JUDGE WHITEHEAD: What's the difference?

11 MR. COCKINGS: Between taste and choice?

12 JUDGE WHITEHEAD: I mean, because if you -- if I was to
13 understand it, you can set the temperature of the product, right?

14 MR. COCKINGS: Right.

15 JUDGE WHITEHEAD: To -- it all depends on if you have a certain
16 product and the kind of meat that you have, and you set a certain
17 temperature.

18 MR. COCKINGS: Right.

19 JUDGE WHITEHEAD: And I just didn't get the taste aspect of it.
20 Once you set that temperature, it's not like the probe itself actually has the
21 capacity to actually taste the particular subject.

22 MR. COCKINGS: Yes.

23 JUDGE WHITEHEAD: However, it's the temperature that's going to
24 determine what the taste is going to be, you know, whether it's medium rare
25 or, you know, well done, that kind of thing.

26 MR. COCKINGS: Right.

1 JUDGE WHITEHEAD: Could you try and explain that to me a little
2 bit?

3 MR. COCKINGS: Well, what -- yeah. So, in the -- with respect to
4 the invention, that's important, and it's an important feature, because what
5 we claim is a microprocessor that is operable to calibrate to particular taste
6 preferences, for example, medium rare, rare and, you know, like well-done.

7 Now, the reason why that's important in terms of the feature is that it
8 allows the user to just set whatever the desired setting needs to be and then
9 they're free to walk away. And in the context of what's claimed, that allows
10 the user mobility and it also is a feature that's not particularly shown in the
11 prior art.

12 So, in terms of what's happening there, when you -- that the
13 microprocessor is used to set settings that are input by the user, so that when
14 the meat or the food reaches a particular temperature setting, then, presto,
15 the user then knows that the food is cooked to their -- whatever level or taste
16 preference that they want it to be cooked at.

17 JUDGE KRIVAK: But doesn't -- pardon my pronunciation --
18 Tymkewicz teach this feature?

19 MR. COCKINGS: No. Tymkewicz doesn't actually teach this
20 feature, because Tymkewicz doesn't go that far. In fact, Tymkewicz sort of
21 makes it clear, you know, if you look at column 7, lines 55 to 59, and I'll just
22 read it for you:

23 "The user views the analog indication in relation to the indication of
24 the appropriate cooking temperature for a food substance, 642, to make an
25 immediate and accurate determination of the cooked status of the food
26 substance."

1 So what Tymkewicz is really showing you, and if you look at Figure
2 7, is that what you have is you take these analog readings from the
3 thermometer, and as these analog readings are increasing, you have this bar.
4 And as that bar reaches a certain level, you, the user, says, okay, it's medium
5 now. So you make the determination. As opposed to having a
6 microprocessor, that at the end of the day the microprocessor says, you don't
7 need to make a determination; I'll make the determination for you. Presto,
8 your lamb is medium or your lamb is well or whatever, you know, selection
9 you chose, because if you look at Figure 7, you can see that there's a bar,
10 242, and then beneath that bar there's a little arrow. So what he's doing is --
11 what he's really calibrating is, I have an analog reading, and I need to take
12 that analog reading and make it into a digital representation that I put on the
13 screen. You know, I think if you look at --

14 JUDGE KRIVAK: But doesn't Tymkewicz, in column 7, lines -- oh,
15 let's see -- line 28, say that the calibration offset value is programmed into
16 the microprocessor by the user? It does.

17 MR. COCKINGS: But it's a calibration offset value. And I think
18 when he's talking about offset value, if you look back at column 2, line 32, I
19 think the offset value is the value for the difference between what the analog
20 reading is, versus what the digital reading needs to be.

21 Look at column 6, lines 20 to 29, and you can see there, he talks about
22 that -- he compares the -- let me just read it:

23 "The microprocessor receives a temperature-proportional digital
24 signal from the analog to digital converter, compares the temperature-
25 proportional digital signal to the calibration values."

1 So he's not doing a calibration to figure out whether or not you've
2 reached a proper taste preference. He's, to me, doing a calibration to say
3 when you make an analog reading, you have to make a representation of that
4 in a digital domain, and so he's trying to figure out how to make the best
5 representation of those values based upon these readings.

6 JUDGE SAADAT: I mean, I understand your position, but it seems
7 like the Examiner relied on Tymkewicz, Figure 7, to show that the
8 representation, that analog bar, is corresponding to the taste and the type of
9 food, because it corresponds to the lower buttons, beef, lamb, and so forth.
10 And the basic elements, in order to do that calibration, it's just temperature
11 and time.

12 There are -- I mean, the computer would not understand what the beef
13 or other types of foods that are being cooked are. There's no -- a computer
14 doesn't add spices to change the taste. It's just based on temperature and
15 time. So, when it's corresponding -- as if you have a lookup table.

16 MR. COCKINGS: Right, okay, yeah. But, you know, I think if you
17 look at Figure 7 though, in the context of what's disclosed at paragraph 7,
18 lines 55 to 59, the user views the analog indication 242 in relation to the
19 indication of the appropriate cooking temperature for the food substance to
20 make an immediate and accurate determination of the food status of the food
21 substance.

22 So, and if you look back at 242, you can see here, it's that it shows
23 140 degrees. So what's it's doing is it's simply saying as this bar raises, you,
24 the user, can then look at it and determine whether or not the meat is cooked
25 to your doneness or taste-preference level.

1 JUDGE SAADAT: But the claim doesn't require what happens after
2 that. Does the computer take the turkey out of the oven? No. It just
3 indicates that level of temperature and time has reached, which corresponds
4 to a particular taste. So that determination is after the fact. The user
5 determines that it's time to take the food out of the, for example, oven, once
6 this bar reaches, or the arrow at the bottom reaches, one of those dots that
7 correspond to a type of food. And that's --

8 MR. COCKINGS: Yeah, but -- go ahead. Sorry.

9 JUDGE SAADAT: That's all right. That's how we think the
10 Examiner saw it.

11 MR. COCKINGS: Yeah, but in the -- you've -- I think you've got to
12 read the reference, in fairness to what it actually discloses.

13 I understand that's the way the Examiner saw it, but the reference
14 makes it explicit that it's not -- the user doesn't make the determination, you
15 know, like is she going to take the food out of the oven or something like
16 that. To me, the reference is showing you that the user has to look at this
17 bar, 242, to determine when she -- when it's done to her satisfaction.

18 So, you know, even though, you know, if the user says, well, you
19 know, I'm going to wait till this bar goes up to lamb, then the user has
20 decided that even if it's beef in there, and the user has decided that whatever
21 lamb is, I'm going to cook this particular piece of meat to a lamb perfection.

22 Whereas, what's claimed is telling you that the microprocessor is
23 operative to do that determination. So it's different than what's disclosed in
24 Tymkewicz.

25 JUDGE KRIVAK: Well, but Tymkewicz, column 2 -- tell me -- just
26 if you could differentiate what's said there and what you're saying -- you

1 know, it says a microprocessor controls the food temperature sensing and
2 indicating device.

3 MR. COCKINGS: Which --

4 JUDGE KRIVAK: That's lines 30 on, actually it starts a little above
5 that, 28 or so.

6 MR. COCKINGS: 28?

7 JUDGE KRIVAK: 28 just says an analog-to-digital converter
8 receives the temperature proportional output voltage and converts it to a
9 temperature, but then the microprocessor controls the food temperature
10 sensing and indicating device.

11 MR. COCKINGS: So, yeah. I mean, what does that mean, though? I
12 mean, is it --

13 JUDGE KRIVAK: That's what I need you to tell me.

14 MR. COCKINGS: No, I mean, I think fairly read it is -- the
15 microprocessor -- the food temperature sensing is going to the fact that
16 there's a temperature probe, and it's actually reading those measurements,
17 and the next sentence after that tells you that -- what the microprocessor
18 does with those measurements, in terms of having a calibration value.

19 The second part of that sentence talks about what it does with the
20 indicating device. And it also tells you that -- in this next sentence, it's got
21 to convert the temperature-proportional digital signal into a driver input
22 signal. So the reference is telling you -- what the microprocessor is doing is
23 converting those into different driver signals.

24 Now that driver signal could mean -- means that it's going to display
25 on the display a particular number, 140 degrees. That means that it's going
26 to move that bar up. So it's taking that analog reading, an analog reading

1 and almost like in your old-fashioned thermometer with the mercury, it's just
2 saying the mercury bar is going up, it's going up; all right, you tell -- I'm
3 done. You decide. As opposed to having a microprocessor that says you
4 don't have to decide. You're done. You're done because within that
5 microprocessor is the -- whatever the programs or the code that you need to
6 just make the determination based on the combination of different types of
7 meat and settings and preferences. So I -- we don't believe that Tymkewicz
8 shows that much.

9 JUDGE SAADAT: The way I see the claim, and that's why I have so
10 much trouble agreeing with you, is that the claim only requires the
11 microprocessor be operative to calibrate a taste preference and a choice
12 preference. It doesn't say it controls the cooking process. It doesn't say
13 that -- the claim doesn't require that the microprocessor stops the heater in
14 the oven, for example.

15 MR. COCKINGS: That's right, but --

16 JUDGE SAADAT: Does it?

17 MR. COCKINGS: No, the -- yeah, we agree with that, that the
18 microprocessor -- that's what's claimed is simply that --

19 JUDGE SAADAT: So it's just an act of calibration that's done by
20 microprocessor. What's --

21 MR. COCKINGS: Yeah, but for -- the references would have to show
22 that same act of calibration, and our argument is that, and our position is that
23 Tymkewicz doesn't show that same act of calibration. Tymkewicz is talking
24 about a different act of calibration.

25 In the act of calibration, he's talking -- and there's two or three places
26 that we pointed that says he's talking -- you know, he doesn't make it even

1 clear, or even close to clear, that it even covers that. What he's talking about
2 is, what you're doing is you have to calibrate from an analog domain to a
3 digital domain, and then you also have to take that signal and do two things
4 with it. One thing you have to do with it is you have to control the food
5 temperature sensing. That's part of the analog-to-digital domain. The other
6 thing is you've got to put together a driver signal for an indicating device.

7 So we don't see that as calibrating operative to taste preference. In
8 fact, the reference does use the word calibrating, but never puts those two
9 concepts together.

10 I don't know if there's any further questions?

11 JUDGE WHITEHEAD: Yeah. Let's talk about your second issue that
12 you had.

13 MR. COCKINGS: My second issue.

14 JUDGE WHITEHEAD: You were talking about the handheld.

15 MR. COCKINGS: Right.

16 JUDGE WHITEHEAD: You remember talking about that?

17 MR. COCKINGS: Yes. So the Examiner's primary argument with
18 respect to the handheld feature is that, you know, making a device portable
19 doesn't make it patentable, and, you know, she points to law on that.
20 However, despite making that statement, none of these references show that
21 particular combination, meaning a second handheld device that's in
22 communication with a first handheld device.

23 The prior art that's really relied on shows either these single units, or
24 when it has a second unit, the unit is typically a desktop computer. And, you
25 know, we've been going back and forth with the Examiner that --

1 JUDGE WHITEHEAD: I'm sorry, are you referring to Heagle when
2 you're talking about the desktop?

3 MR. COCKINGS: Yeah, I'm referring to Heagle and I'm referring to
4 May.

5 JUDGE WHITEHEAD: Okay. Now, Heagle, look at Figure 2.

6 MR. COCKINGS: Figure 2.

7 JUDGE WHITEHEAD: They have a CPU, which is 50.

8 MR. COCKINGS: Right.

9 JUDGE WHITEHEAD: Right? Now, they don't specify that's a
10 desktop, right? They just say it's a CPU.

11 MR. COCKINGS: Yeah. But if you look at column 16, line 51, he
12 says "Here, CPU 50 is the main control center of multitasking capabilities
13 and is connected to Interface Unit 60. CPU 50 includes a printer, a 61
14 monitor," and so on and so forth. So I think in reading it in this context it's
15 clear that he -- what he imagined or what he discloses as a CPU wasn't
16 something that was going to be handheld because it is like a central-type of
17 computer that all these other devices are feeding into.

18 JUDGE WHITEHEAD: Yeah, but that's like -- not to push this
19 point -- but couldn't that be like, you have a laptop, and you have all these
20 peripheral components connected. You don't have to have them connected.
21 But you just have -- you have the option to have them connected. So, I
22 mean I don't see how 50, the CPU 50 is automatically a desktop because it
23 has peripherals connected to it.

24 MR. COCKINGS: Well, if you look again at column, you know, 8,
25 he talks about a CPU, you know, as being a personal computer. And in the
26 context of column 8, lines, you know, 63 to 64, even though he describes

1 there a dedicated microprocessor with sufficient memory, the fact is the
2 matter that in the other places what he describes is something that is more
3 than a microprocessor. That it's something that requires much more than
4 being in a simple handheld-type device.

5 And the fact of the matter is that what he does disclose is -- he doesn't
6 mention a laptop. He doesn't mention a handheld device, even though in the
7 patent, he talks about handheld devices. I'm talking about Heagle. Heagle
8 does disclose handheld devices.

9 JUDGE WHITEHEAD: Right.

10 MR. COCKINGS: But when it comes to the CPU, he doesn't disclose
11 the CPU as being a handheld device. I think that the places that he does
12 point to the CPU, like the column I was pointing to, to me, a fair reading of
13 it indicates that it's a desktop. It's a mainframe.

14 And part of the reason why I step over to May is because I think May
15 is sort of instructive in seeing in 1999 what people were thinking about as a
16 CPU. Because even May, in Figure 4, discloses a desktop computer. And I
17 think that given the type of functionality that Heagle is talking about, that
18 what he was considering was a desktop computer.

19 But even if it was a handheld computer -- even if it was a laptop
20 computer, I don't think if I had a laptop computer in the context of this
21 invention qualifies as a second handheld unit, because the context of the
22 invention is to have something that's really portable that gives you the
23 convenience and the mobility that comes with this particular scheme.

24 So I think, overall, you know, even though the Examiner is coming at
25 us individually, you know, we think that's why even in -- even after KSR,
26 you know, KSR says that a patent composed of several elements is not

1 proved obvious merely by demonstrating that each of his elements was
2 independently known in the prior art.

3 So, I think if you look at the key individual pieces of prior art in
4 isolation, I think you sort of end up with this roadmap that the claim leads
5 you on. But, at the same time, you've got to take things in the context of the
6 combination. And we think that there's two important aspects of this
7 combination. One aspect is having a second handheld unit. The other aspect
8 is having this microprocessor and it gives you the taste preference.

9 Now, what the industry has borne out since 1999 is that those two
10 features are significant. Those two features sell this product. I think, as you
11 may see from some of the things that I refer to as part of the secondary
12 evidence, you know, when Mr. Chapman first introduced this product on the
13 market in 2000, no one else was doing this. No one, despite the prior art
14 that's before you, no one had put this particular system together, and it's a
15 system claim.

16 Since that time, we've had a lot of players, big and small, that have
17 come along. You've got the Brookstone unit over there. Let me get the
18 Brookstone.

19 JUDGE WHITEHEAD: Can you hold those up?

20 MR. COCKINGS: Yeah. Here's the Brookstone. May I approach, if
21 you'd like to --

22 JUDGE SAADAT: Sure. Has the Examiner seen this?

23 MR. COCKINGS: The Examiner -- I believe we were showing the
24 Examiner these, right?

25 JUDGE KRIVAK: Excuse me.

26 MR. COCKINGS: Oh, I am sorry.

1 JUDGE WHITEHEAD: I think since the last time, we noted the
2 Examiner -- there's been several new ones, including the market one.

3 MR. COCKINGS: Yeah. The Examiner has seen the Brookstone
4 unit. And Brookstone just made a new -- you could call it an improvement.
5 They stopped putting in a curve probe. Now they're going to straight probe.

6 So, yeah. You know, we've got other units. Again, another one, with
7 another straight probe. But you can see -- the concept is, and the advantage,
8 is, mobility. The advantage is convenience.

9 JUDGE KRIVAK: So, I have a question then. If it's the computer,
10 the handheld unit, does -- I -- where it says -- what about a laptop? Your
11 claim -- is your claim broad enough? Handheld unit, a laptop, you can hold
12 in your hand.

13 MR. COCKINGS: But look at these -- look at the handheld units
14 before you. None of them are laptops.

15 JUDGE KRIVAK: No.

16 MR. COCKINGS: A laptop in this particular context wouldn't be
17 convenient. It wouldn't meet the invention because necessarily a laptop has
18 many other functions than does this device. But the advantage of the
19 invention is not having a laptop to lug around.

20 JUDGE KRIVAK: Right.

21 MR. COCKINGS: You're not going to be out barbecuing on a
22 Saturday and cutting the lawn, and say, all right, and, you know, your wife
23 yells -- sorry. or somebody yells --

24 JUDGE KRIVAK: Your husband yells.

25 MR. COCKINGS: Your husband yells, "Honey, is that beef done
26 yet?" And you're like, "Okay, hold on a second there, give me a second.

1 Fifteen more minutes," you know, it's bam, on your hip, and then, and then
2 that.

3 But I think one significant thing that I'd like to just bring together,
4 because, you know, I can see the Examiner's side, and I can see the
5 collection that the reference is, and I can see how she combines them.

6 I don't think the combination is reasonable. I don't think it shows all
7 the features that are in the claim. I also think that the Patent Office
8 recognizes that there's something patentable here. There's something
9 patentable here. We've given you three patents. So what we're here to say is
10 what's patentable here is the combination of these features. And the
11 combination of these features is significant, without even including a curve
12 probe, and the reason why that's significant is, if you look at what
13 Brookstone says in advertising their product, they say "Enjoy fear-free
14 cooking with our wireless remote cooking thermometer. Grilling on the
15 barbecue is a great way to entertain. Constantly standing next to the grill,
16 however, is not." So, you know, having that handheld unit and being able
17 to walk away is a significant selling point and a significant advantage. In
18 fact, it's what they're advertising. It's the very feature we're fighting over,
19 one of the features.

20 JUDGE SAADAT: Well, we really understand the concept. From
21 our point of view, we have to look at the positions taken by each side in
22 determining the dispute. And we definitely think, yeah, it is a great
23 invention, or the samples you showed us, it looks very impressive. So, we're
24 back to, you know, the file, the record, and references and the arguments.

25 MR. COCKINGS: Okay.

1 JUDGE SAADAT: So, I think we fully understood your position.

2 Any other questions?

3 JUDGE KRIVAK: I have no further questions.

4 JUDGE SAADAT: Carl, do you have any?

5 JUDGE KRIVAK: Carl?

6 JUDGE WHITEHEAD: I'm good.

7 JUDGE SAADAT: So we will just make our decision on the record

8 and the arguments here. Thank you so much.

9 MR. COCKINGS: Oh, thank you.

10 JUDGE SAADAT: Don't forget your samples here.

11 MR. COCKINGS: Oh, yeah.

12 Oh, well, I apologize. This is the original product that was written
13 about in the 2000 *New York Times* article. And, you know, this is made by
14 the Ready Check product, so, you know, this is made by Maverick Investors.

15 JUDGE KRIVAK: Okay.

16 MR. COCKINGS: All right.

17 JUDGE SAADAT: Just out of curiosity, you have put this into
18 production, yes?

19 MR. COCKINGS: Say again?

20 JUDGE SAADAT: This product is in production?

21 MR. COCKINGS: Yeah. We -- they have sold over three-quarters of
22 a million in ten years. Probably close to a million now of units.?

23 MR. CHAPMAN: Um-hum.

24 MR. COCKINGS: So, it's a significant product. It's a significant
25 invention, in fact, because it helps to open doors for other products in the
26 business. But I'll just pack up.

- 1 JUDGE SAADAT: Thank you so much.
- 2 JUDGE KRIVAK: Thank you very much.
- 3 MR. COCKINGS: Thank you.
- 4 (Whereupon, the proceedings, at 10:43 p.m., were concluded.)